UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Plaintiff, and NATURAL RESOURCES DEFENSE COUNCIL, INC. and SIERRA CLUB, Intervenors-Plaintiffs, v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY, Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

AGREEMENT REGARDING PRESERVATION, REVIEW AND PRODUCTION OF CERTAIN ELECTRONICALLY STORED INFORMATION AND PRIVILEGED MATERIALS

WHEREAS, the Parties are engaged in litigation in the above-captioned matter; and

WHEREAS, the Parties mutually seek to reduce the time, expense, and other burdens of discovery of certain electronically stored information ("ESI") and privileged materials, as described further below, and to better define the scope of their obligations with respect to preserving such information and materials.

NOW THEREFORE, the Parties stipulate as follows:

1. **General ESI Provisions.** Counsel have agreed to meet and confer in good faith as necessary in order to develop a reasonable process of producing ESI relevant to the claims and defenses in this action and responsive to particular discovery requests. Counsel agree to make good faith and reasonable inquiries of their ESI systems to identify and collect relevant and responsive ESI from custodians. Where the volumes of potentially relevant and responsive

information are large, Counsel agree to meet and confer about ways to manage the burdens of discovery appropriately, which may include using appropriate search terms or other reasonable culling methodologies. Subject to their objections, the Parties will produce relevant and responsive electronic documents identified in this process in the form agreed to by the Parties.

2. **Preservation Not Required for Not Reasonably Accessible ESI**.

a. The Parties agree that, except as provided in Subparagraph 2.b, the Parties need not preserve the following categories of ESI for this litigation:

i. Data duplicated in any electronic backup system for the purpose of system recovery or information restoration, including but not limited to: system recovery backup tapes; continuity of operations systems; and data or system mirrors or shadows that are routinely purged, overwritten, or otherwise made not reasonably accessible in accordance with an established routine system maintenance policy;

ii. Voicemail messages;

iii. Instant messages that are not ordinarily printed or maintained in a server dedicated to instant messaging;

iv. Electronic mail or pin to pin messages sent to or from a Personal Digital Assistant (*e.g.*, Black Berry Handheld) provided that a copy of such mail is routinely saved elsewhere;

v. Other electronic data stored on a Personal Digital Assistant, such as calendar or contract data or notes, provided that a copy of such information is routinely saved elsewhere;

vi. Logs or other documents recording calls made or received from cellular phones or land line phones, excluding documents related to the content of the phone calls;

vii. Deleted computer files, whether fragmented or whole;

viii. Temporary or cache files, including internet history, web browser cache and cookie files, wherever located;

ix. Server, system, or network logs; and

x. Electronic data temporarily stored by laboratory equipment or attached electronic equipment, provided that such data is not ordinarily preserved as part of a laboratory report.

b. Notwithstanding Subparagraph 2.a, if on the date of this Agreement either Party has a policy established by management that results in the routine preservation of any of the categories of ESI identified in Subparagraph 2.a, such Party shall continue to preserve information that was preserved in accordance with that policy, even if the Party subsequently changes its policy so that such information will no longer be routinely preserved in the future. However, the Parties shall have no obligation, in response to general discovery requests, to search for, produce, or create privilege logs for, ESI covered by this Subparagraph 2.b. Nothing in this Subparagraph 2.b shall prohibit or prevent a Party from changing its policy, for prospective application only, for reasons unrelated to this litigation.

3. **Obligations Related to "Draft" Documents and "Non-Identical" Documents.** For the purposes of preserving potentially discoverable material in this litigation, and for purposes of discovery in this litigation, the Parties agree that a "draft" document, regardless of whether it is in an electronic or hard copy form, shall mean, "a version of a document shared by

the author with another person (by email, print, or otherwise)." In addition, a "non-identical" document is one that shows at least one facial change such as the inclusion of highlights, underlining, marginalia, total pages, attachments, markings, revisions, or the inclusion of tracked changes. The Parties agree that they need not preserve for discovery a document before and after every change made to it, so long as "draft" documents, as defined by this paragraph, are preserved and produced upon request as required by the Federal Rules of Civil Procedure. The Parties further agree that they shall preserve any presently existing "non-identical" documents that are relevant to the subject matter involved in this action, except as provided for in Paragraph 2. A document that is identical on its face to another document, but has small detectable differences in the metadata, shall be considered an identical copy.

4. **No Discovery of Material Not Required To Be Preserved**. The Parties agree not to seek discovery of items that need not be preserved pursuant to Paragraphs 2-3 above. If any discovery request is susceptible of a construction that calls for the production of items that need not be preserved pursuant to Paragraphs 2-3, such items do not need to be provided nor identified on a privilege log pursuant to Fed. R. Civ. P. 26(b)(5).

5. **Preservation Does Not Affect Discoverability or Claims of Privilege**. The Parties agree that by preserving information for the purpose of this litigation, they are not conceding that such material is discoverable, nor are they waiving any claim of privilege. Except as provided in Paragraph 4 above, nothing in this Agreement shall alter the obligations of the Parties to provide a privilege log for material withheld under a claim of privilege.

6. **Other Preservation Obligations Not Affected**. Nothing in this Agreement shall affect any other obligations of the Parties to preserve documents or information for other

purposes, such as pursuant to court order, administrative order, statute, or in response to other anticipated litigation.

7. **Privileged Materials Located in the Offices of Counsel for the Parties**. The Parties agree that, in response to general discovery requests, the Parties need not search for and produce, nor create a privilege log for, any privileged material that is located in the offices of counsel for the Parties at the Department of Justice, EPA, DTE Energy Co. and Detroit Edison Co. (collectively "DTE"), Hunton & Williams, Pepper Hamilton, the Gret Lakes Environmental Law Center, the Natural Resources Defense Council, Inc. ("NRDC"), or the Sierra Club.

8. **Format and Media**. Unless altered by subsequent written agreement of the Parties, the format and media to be used in the production of ESI shall be as follows: Electronic Documents and Hard Copy Paper Documents should be produced as Tiff image files in an electronic format. Specifically, the Tiff images should be produced as a single-page Group IV TIFF format and accompanied by an IPRO LFP load file (or other generally acceptable load file format). The full extracted or OCR text should be included and produced at a document level and located in the same folder as their respective document image. Counsel agree to produce documents in color upon request and to meet and confer in good faith regarding the production of documents that a Party prefers be produced in any other format for the purpose of viewing the document in color. Spreadsheet files (*i.e.*, Excel) and Powerpoint files will be produced in native format. A placeholder Tiff will be provided along with a link to the native file in the load file. The Tiff placeholder also will have a confidentiality endorsement, if applicable, and a Bates number endorsement. Native documents will be converted to Tiff if a redaction is necessary.

9. **Obligation to Prepare Privilege Log**. The obligation to log privileged or work-product documents shall apply only to documents created on or before August, 5, 2010.

Documents created after that date must be produced if responsive and non-privileged, but need not be included on a privilege log.

10. **Effect of Inadvertent Production of Documents**. Consistent with Rule 502 of the Federal Rules of Evidence, the inadvertent production of documents to any Party or non-Party in connection with this litigation shall not waive any privilege that would otherwise attach to such documents.

11. **Procedure in Event of Inadvertent Production**. The following procedure shall apply to any such claim of inadvertent production:

a. Upon learning of the inadvertent production, the producing Party shall promptly give all counsel of record written notice of the inadvertent production. The notice shall identify the document, the portions of the document that were inadvertently produced, and the first date the document was produced. If the Party that produced a document claims that only a portion of the document was inadvertently produced, the Party shall provide with the notice of inadvertent production a new copy of the document with the allegedly privileged portions redacted.

b. Upon receiving notice of inadvertent production, or upon determining that a document received is known to be privileged, the receiving Party must promptly return, sequester, or destroy the specified information and any copies it has, and shall destroy or sequester any notes that reproduce, copy, or otherwise disclose the substance of the privileged information. Notwithstanding the preceding sentence, the receiving party may challenge a claim of privilege pursuant to Subparagraph 11(e) hereof. The receiving Party may not use or disclose the information until and unless the claim of privilege is resolved against the Party claiming inadvertent production of privileged material. If the receiving Party disclosed the information

before being notified, it must take reasonable steps to retrieve and prevent further use or distribution of such information until the claim is resolved.

c. A Party receiving documents produced by another Party is under a good-faith obligation to promptly alert the producing Party if a document appears on its face or in light of facts known to the receiving Party to be privileged.

d. To the extent that either Party obtains any information, documents, or communications through inadvertent disclosure, such information, documents, and communications shall not be filed or presented for admission into evidence or sought in discovery by that Party in this action or any other proceeding.

e. In the event the receiving Party disputes the assertion of privilege, the Parties shall meet and confer and the requesting Party shall either: (a) return the material to the producing Party for proper designation, or (b) present the information to the Court under seal for a determination as to whether the material is protected from disclosure.

12. **Entire Agreement**. This Agreement contains the entire agreement of the Parties relating to the subject matter of this Agreement, and no statement, promise, or inducement made by any Party to this Agreement that is not set forth in this Agreement shall be valid or binding, nor shall it be used in construing the terms of this Agreement. This Agreement may only be modified by upon written agreement of the Parties.

13. **Effective Upon Signing**. This Agreement is effective upon execution by the Parties, without regard to filing with the Court, and may be signed in counterparts.

14. **Definition of "Party"**. For the purposes of this Agreement the term "Party" means one of the following:[1]

a. DTE, its counsel, and any other person who possesses information within the custody and control of DTE; or

b. the United States Department of Justice, the United States Environmental Protection Agency, and any other person who possesses information within the custody and control of the United States Department of Justice, the United States Environmental Protection Agency.

c. NRDC, its counsel, and any other person who possesses information within the custody and control of NRDC; or

d. the Sierra Club, its counsel, and any other person who possesses information within the custody and control of the Sierra Club.

15. **Sanctions**.

a. No Party shall seek sanctions pursuant to the Federal Rules of Civil Procedure, the contempt powers of the Court, or any other authority against another Party for the failure to preserve electronic information that is not required to be maintained pursuant to Paragraph 1;

b. Nothing in this Agreement shall give rise to a claim for sanctions for failure to preserve information prior to the effective date of this Agreement.

[1] This Agreement, unless and until modified, applies to the United States and DTE upon signature whether or not intervention is allowed.

SO STIPULATED

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2010, the foregoing Agreement was served on all counsel of record via the Court's ECF system.

/s/ Mark B. Bierbower
Mark B. Bierbower